Lim Cheong Kern v Vacpak Realty Sdn Bhd & Anor

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 24-237 OF 1997
SURIYADI J
11 JANUARY 1999

Companies and Corporations *— Register of members — Rectification of register — Restructuring exercise authorized by board of directors questioned — Whether matter could be dealt with summarily — Companies Act 1965 s 162*

The plaintiff — one of the original directors and subscribers of the first defendant ('the company') — was allotted some shares by the company. A mechanism was approved by the board of directors whereby part of the shares owned by the plaintiff were to be surrendered to one Kasim ('the second defendant'). Counsel for the plaintiff in his attempt to denigrate the restructuring exercise as questionable, stressed that that exercise contravened the company's memorandum and articles and the Companies Act 1965 ('the Act'). Therefore, he submitted, the transfer of shares from the plaintiff to Kasim was invalid, thus requiring the rectification of the company's register under s 162 of the Act, in order to restore the material shares to the plaintiff.

Held, dismissing the application with costs:

The power to rectify the register under the section is a summary remedy. Where courts are faced with serious disputes of title, allegations of fraud or some further investigation pertaining the facts may be required, the proper course will be to commence a suit against the company. Since the matter at hand could not satisfactorily be explained by the available affidavits, and by reason of the complex facts, and the prevalence of a substantial number of intricate legal points yet to be resolved, the application was dismissed (see pp 304B, G–I and 305A); *Re Len Chee Omnibus Co Ltd; Chin Sow Lan v Lee Chee Omnibus Co Ltd & Ors* [1969] 2 MLJ 202, *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244 and *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217 followed.

[Bahasa Malaysia summary

Plaintif — salah seorang daripada pengarah dan pemegang asal defendan pertama ('syarikat tersebut') — telah diberikan beberapa saham oleh syarikat tersebut. Suatu mekanisme telah diluluskan oleh lembaga pengarah yang mana sebahagian daripada saham yang dimiliki oleh plaintif hendaklah diserahkan kepada seorang bernama Kasim ('defendan kedua'). Peguam plaintif dalam percubaannya untuk memburuk-burukkan kerja penyusunan semula sebagai boleh dipersoalkan, menegaskan bahawa kerja itu melanggar memorandum

dan perkara-perkara syarikat tersebut dan Akta Syarikat 1965 ('Akta tersebut'). Maka, beliau berhujah, pindahan saham-saham daripada plaintif kepada Kasim adalah tak sah, justeru itu menghendaki pembetulan daftar syarikat tersebut di bawah s 162 Akta tersebut, bagi mengembalikan saham-saham yang material kepada plaintif.

Diputuskan, menolak permohonan dengan kos:

Kuasa untuk membetulkan daftar di bawah seksyen tersebut adalah remedi terus. Di mana mahkamah menghadapi pertikaian hakmilik yang serius, pengataan fraud atau siasatan lanjut yang lain mengenai fakta-fakta tersebut mungkin diperlukan, cara yang wajar adalah untuk memulakan guaman terhadap syarikat tersebut. Oleh kerana perkara ini tidak boleh dijelaskan secara memuaskan dengan afidavit yang ada, dan disebabkan fakta-fakta yang rumit, serta sebilangan penghujahan undang-undang yang masih belum diselesaikan, permohonan ditolak (lihat ms 304B, G–I dan 305A); *Re Len Chee Omnibus Co Ltd; Chin Sow Lan v Lee Chee Omnibus Co Ltd & Ors* [1969] 2 MLJ 202, *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244 dan *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217 diikut.]

Notes

For cases on rectification of register of members, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 418–422.

Cases referred to

Asian Organization Ltd, Re [1961] MLJ 295 (refd)
Bellerby v Rowland & Marwood's Steamship Co Ltd [1901] 2 Ch 265 (refd)
Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid [1979] 2 MLJ 244 (folld)
Derham & Allen Ltd, Re [1946] 1 Ch 31 (refd)
Imperial Chemical Industries Ltd, Re [1936] 2 All ER 463 (refd)
Len Chee Omnibus Co Ltd; Chin Sow Lan v Lee Chee Omnibus Co Ltd & Ors [1969] 2 MLJ 202 (folld)
Sing Eng (Pte) Ltd v PIC Property Ltd [1990] 3 MLJ 129 (refd)
Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd [1992] 2 MLJ 217 (folld)

Legislation referred to

Companies Act 1965 s 162, (1)

D'Cruz (*Kesavan & Associates*) for the plaintiff.
Raghbir Singh Gill (*Raghbir Singh Gill & Co*) for the first defendant.
Allan WM Tan (*Malik & Partners*) for the second defendant.

Suriyadi J: It is common ground that the first defendant was incorporated on 14 September 1990, limited by shares, with an allowable capital of RM500 to be divided by 500,000 shares valued at RM1 each. This company also had its own peculiar memorandum of articles. The plaintiff was one of the original directors and subscribers of the company, and on 1 August 1994 was allotted 249,998 shares, making a total of 249,999 shares, inclusive of the original one share held by him. On 21 April 1995, the second defendant ('Kasim'), was supposed to have been inducted as a director of that company. On 6 May 1996, the plaintiff resigned as a director of the first defendant as evidenced by LCK7 (encl 2). The other substantial shareholder is one Lim Tiong Huat ('LTH3') who was allocated 249,998 shares.

This company (interchangeably 'the first defendant'), negotiated with Perbadanan Kemajuan Negeri Melaka ('PKNM') for a piece of land, with the approval given conditional on a 40% bumiputra equity to be held in that company (KY1 (encl 11)). Pursuant to that condition, a director's resolution was passed on 19 May 1995 (KY3) acquiescing to it. I now reproduce this document:

> Vacpak Realty Sdn Bhd
>
> (Incorporated in Malaysia)
>
> Pursuant to the authority given by art 112 of the company's articles of association, we, the undersigned, being a majority of/all the directors of the company for the time being in malaysia, do hereby resolve:
>
> *Tanah Kerajaan Lot 45, Mukim Bukit Katil, Daerah Melaka Tengah, Melaka*
>
> THAT the company be and is hereby authorized to apply and accept all that piece of Government Land known as Tanah Kerajaan Lot 45, Mukim Bukit Katil, Daerah Melaka Tengah, MELAKA covering an area of approximately 21,781 acres from PERBADANAN KEMAJUAN NEGERI MELAKA at total purchase price of RM3,042,000 for the purpose of converting into a housing estate as per the terms and conditions in their letters of offer both dated 16 February 1995 and 17 April 1995.
>
> THAT the said project be and is hereby guaranteed by all the directors jointly and severally.
>
> THAT any two directors be and are hereby authorized to deal and sign all documents pertaining to the said matters and that the common seal of the company be affixed thereto, where necessary, in the presence of two directors or a director and the secretary.
>
> Dated this 19 May 1995
>
> Confirmed,
> Directors:
>
> sgd — sgd
> Lim Teng Huat — Lim Cheong Kern
>
> sgd
> Kasim bin Md Yusof

A mechanism was approved by the board of directors whereby part of the shares owned by Lim Teng Huat and the plaintiff were to be surrendered to Kasim. As per KY5A and KY5B, 99,999 shares were to be transacted from the first plaintiff for the benefit of Kasim whilst an additional 99,998 shares came from Lim Teng Huat. For easy reference, I herewith reproduce KY5A and KY5B. They read:

Vacpak Realty Sdn Bhd

(Incorporated in Malaysia)

Pursuant to the authority given by art 112 of the company's articles of association, we, the undersigned, being a majoriy of/all the directors of the company, for the time being in Malaysia, do hereby resolve:

Splitting of shares

THAT the splitting of the following share certificates be and are hereby approved:

Names	Old share certificate Nos	No of Shares	New share certificates Nos	No of Shares
Lim Cheong Kern	005	249,998	010	149,999
			011	99,999
Total		249,998		249,998
Lim Teng Huat	006	249,998	012	150,000
			013	99,998
Total		249,998		249,998

THAT the old share certificates be cancelled and that new share certificates be issued and that the common seal of the company be and is hereby affixed onto the new share certificates in accordance with the company's articles of association.

Date this 8 March 1996

Confirmed,
Directors;

sgd
Lim Cheong Kern

sgd
Lim Teng Huat

sgd
Kasim bin Md Yusof

Vacpak Realty Sdn Bhd
(Incorporated in Malaysia)

Pursuant to the authority given by art 112 of company's articles of association, we, the undesigned, being a majority of/all the directors of the company, for the time being in Malaysia, do hereby resolve:

Transfer of shares

THAT the transfer of the following shares of RM1 each be and are hereby approved subject to the receipt of the stamped transfer deeds:

Transferors	Old share certificates Nos	Transferees	New share certificates Nos	No of shares
Lim Liong Watt	001	Kasim bin Md Yusof	007	1
Yeow Kim Hong (f)	003	Kasim bin Md Yusof	008	1
She Guat Hwai (f)	004	Kasim bin Md Yusof	009	1
Lim Cheong Kern	011	Kasim bin Md Yusof	014	99,999
Lim Teng Huat	013	Kasim bin Md Yusof	015	99,998
Total				200,000

THAT the old share certificates in the names of the transferors be cancelled and that new share certificates in the names of the transferees be issued and that the common seal of the company be and is hereby affixed onto the new share certificates in accordance with the company's articles of association.

Dated this 8 March 1996

Confirmed,
Directors;

sgd
Lim Cheong Kern

sgd
Lim Teng Huat

sgd
Kasim bin Md Yusof

Mr D'Cruz for the plaintiff in his attempt to denigrate the restructuring exercise as questionable, stressed that that exercise contravened the company's memorandum of articles and the Companies Act 1965. On that premise, the transfer of 99,999 shares from the plaintiff to Kasim was invalid, thus requiring the rectification of the company's register. That

rectification will have the consequential effect of restoring the material shares to the plaintiff.

It is undeniable that the resolutions of KY5A and KY5B were silent as to the consideration for the shares meant for Kasim. Nor could it be denied that the resolutions expected the transfer to be transacted in 'accordance with the company's articles of association'. The magnitude in the complexity of the facts took a turn for the worse when the plaintiff's counsel added that at the time of receiving the transfer of those shares, as per KY5A and KY5B, Kasim stimultaneously had signed another blank form retransferring the shares to the plaintiff. Unfortunately as that blank document was not before me, I was thus unable to ascertain the truth of that allegation. Were it to be true, then this scheme, in a nebulous way had breached PKNM's condition as status quo would remain.

As early as 19 May 1995, Kasim was already a director, eventhough yet to receive any shares (KY3). Similarly in the document KY5, dated 8 March 1996 he also signed as a director. No doubt art 9 of the memorandum of articles is silent as to the requirement of every director to own the minimum number of shares, but this matter was never completely trashed out before me.

Connected to this directorship issue, it was beyond denial that all the documentations, namely BKY3, BKY5A and BKY5B were co-signed by the plaintiff and Kasim, as far back as 19 May 1995. In other words, he already was aware of the physical presence of Kasim in the company but remained silent. Only when he was fait accompli deprived of control of the company, did he begin to take stock of things and complained. So, when the going was good, he gladly accepted Kasim's presence but not when his fortunes were taking a beating. Now he, like an aggrieved person, demands justice from me by invoking the provision of s 162 of the Companies Act 1965 (*Sing Eng (Pte) Ltd v PIC Property Ltd* [1990] 3 MLJ 129). I now reproduce s 162 which reads:

> (1) If—
>
> (a) the name of any person is without sufficient cause entered in or omitted from the register; or
>
> (b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member,
>
> the person aggrieved or any member or the company may apply to the Court for rectification of the register, and the Court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party to the application.
>
> (2) On any application under subsection (1) the Court may decide —
>
> (a) any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand; and

(b) generally, any question necessary or expedient to be decided for the rectification of the register. A

(3) The Court when making an order for rectification of the register shall by its order direct a notice of the rectification to be so lodged.

This provision specifically provides for the court to rectify the register, and in particular for purposes of removing a person's name from that register (*Re Derham & Allen Ltd* [1946] 1 Ch 31 at p 36). The jurisdiction of the court to rectify the register not only is wide enough to cover where a name has been entered improperly, in this case Kasim, but also where a name has been registered without sufficient cause (*Re Imperial Chemical Industries Ltd* [1936] 2 All ER 463). Due to developments in the law, it is quite safe to say that currently, bearing in mind the discretionary nature of this power, an order will be granted if the applicant can successfully convince the court that justice will prevail if rectification were to be allowed (*Re Asian Organization Ltd* [1961] MLJ 295; *Bellerby v Rowland & Marwood's Steamship Co Ltd* [1901] 2 Ch 265). B C

Aside from the peripheral fact of Kasim being a director without shares, I also had to sieve and scrutinise another set of facts which jump start this case. Factually, it was not denied that the company had borrowed a large sum of money from a bank for purposes of acquiring the impugn land from PKNM. Guarantors were needed. It was alleged that in consideration of the differment of payment of the 99,999 shares, Kasim was supposed to have been required to stand as a guarantor. Yet the supposed guarantee document was never even executed, eventhough attached to the agreement (KY4 encl 11 at pp 30–31. What perplexed me further was the necessity of this requirement when KY3 had already provide that all directors were to be jointly and severally liable. Again no answers were forthcoming. D E

The circuitous path taken before the shares of the plaintiff were eventually transferred to Kasim was dramatic in itself. The plaintiff had alleged that to date he was yet to be compensated inspite of the shares having been transferred. He admitted signing one Form 32A on 2 October 1995 in favour of Kasim, and administratively having handed it to the company's secretary. He ventilated that the transfer of the share certificates would be transacted and finalised only after having received the final purchase price. Due to some error in that form, when he incorrectly printed the desired number of shares, he prepared another similar form but left it unattested. Inspite of the flaw in that first form, the plaintiff submitted that the defendants in collusion with each other, registered that document on 13 March 1996 after having it altered and stamped. This was partly admitted by the first defendant. For some bizarre reason, this document was stamped in Ulu Langat. What remained unexplained was the mystery of the plaintiff having left the second Form 32A unatested. This is not a scenario where a registered owner of shares, intending to pass title, tranfers them to a transferee, by handing over an executed transfer form, but without the name of the transferee filled in that transfer form. In that situation, the transferee would obtain an equitable interest in those shares. F G H I

A In this instance, that unattested document would be of no consequence to anybody as no good title could pass to the transferee. In this case, the transferee is Kasim.

The transfer of shares to Kasim had been completed by 11 June 1997 (KY11 and KY12 of encl 11). In term of time, the plaintiff would B technically not know of this, as by 6 May 1996 he was supposed to have resigned as a director. I have used the word 'supposed' as there were ample documents to show that even after 6 May 1996 he was still active in that company. Among the relevant documents to attest to this supposed resignation is LCK7 of encl 2, where inter alia, a lump sum of RM2.7m was to be paid to the piaintff, with the first payment of RM500,000 payable on C 15 June 1996. He was also supposed to receive a monthly payment of RM100,000 until due completion of all the sums. The contents of the letter were confirmed and accepted by the plaintiff without qualification, as signified by his endorsement.

To elucidate the above point, I must at the outset clarify that the D impression created by both parties was that all the players in the company had colluded together, in order to fufill the earlier pre-condition laid down by PKNM. The picture painted was that, not only was the plaintiff active, but perhaps was also instrumental in suggesting the methods to achieve the company's ends. The documents which involved the plaintiff, prior to the transfer of the shares, and culminating in the stamping of Form 32A in Ulu E Langat, could not have been possible had it not been for his support. At this early stage, the plaintiff perhaps was still not unhappy with his predicament vis-a-vis Kasim. Only when matters deteriorated, in the like of him being edged out of the company, and left uncompensated, did he begin to voice out his concern so as to put him back on his previous footing. It could have been due to this stance that the Board of Directors of the Vacpak Group of F Companies decided to compensate him to the tune of RM2.7m, conditional on him relinquishing all his posts and shares in that group. No doubt had he already been partly paid by Kasim, LCK7 would not have been issued. And of course, this substantial sum must have been meant as consideration for all the shares held by the plaintiff. With that backdrop, out of this letter, G two interesting questions had to be answered by me, namely:

(1) why should the company be held liable to compensate the plaintiff when the shares were meant for Kasim; should he not have been the person partly responsible for that sum of money? Unfortunately, this point was not canvassed by both parties; and

H (2) had LCK7 overtaken events an replaced the initial nefarious scheme of painting a semblance of 40% bumiputra equity having existed in the company? If that were to be so, then this letter could be construed as a contractual agreement, and any default in it entails the commencement of a possible action in the form of a normal judgment debt action. Certainly, the processes under s 162(1) of the Companies I Act 1965 would be inapplicable in this situation. But again, this legal point was not mooted by either party.

From the facts so far already adduced, it would be improbable that this application could be approved by reason of the complex facts, and the prevalence of a substantial number of intricate legal points yet to be resolved. It is quite trite that where courts are faced with serious disputes of title, allegations of fraud or some further investigation pertaining the facts may be required, the proper course will be to commence a suit against the company (*The Annotated Statutes of Malaysia: Companies Act 1965*). In the case of *Re Len Chee Omnibus Co Ltd; Chin Sow Lan v Lee Chee Omnibus Co Ltd & Ors* [1969] 2 MLJ 202, Raja Azlan J (as he then was) at p 203 had occasion to say:

> That section provides for a summary remedy. Its exercise is a matter of discretion which should not be unduly fettered. The decided cases, merely furnish valuable illustrations of the exercise of the discretion. Whether a case falls to be adjudged under s 162 or by a regular action must in the end depend upon the particular facts. However, one thing is clear. Where the facts are admitted and the question is simply one of law as in the case of *Re Stranton Iron and Steel Co* (1873) LR 16 Eq 559, where the applicants, the owner of shares, transferred them to nominees and the question of law was whether the respondent company was justified in refusing registration or where the facts can easily be ascertained such as where an applicant who has applied for shares in a company on the faith of the prospectus stating its objects sought to remove his name from the register on discovering that the prospectus was at variance with the memorandum of association (see *Re Russian Iron Works Co* (1866) 1 Ch App 574), the court will entertain the appication under the summary procedure, but where the facts are complex and in dispute (see *Re Ruby Consolidated Mining Co* (1924) 40 TLR 488) such as where an applicant was induced to take shares by fraud and that facts alleged by him are denied by the company, or where it is clear that some question in dispute calls for investigation as in *Re Greater Britain Products Development Corp* (1874) 9 Ch App 664, the court will refuse to entertain the application and will leave the applicant to seek rectification in a regular action.

Again in the case of *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244, Raja Azlan Shah CJ Malaya (as he then was), at p 250I had this to say with regard to complicated cases:

> The power to rectify the register under the section is a summary remedy. The court on an application under the section may decide any question of title of any party to have his name entered or omitted from the register, whether such question arises between members and alleged members or between such persons and the company. It may also decide any incidental questions arising with the above, if expedient or necessary. Sometimes the summary procedure under the section is not an appropriate remedy. Thus where complicated questions of law and facts arise it is, we think, only proper to refer the parties to a suit, because rectification can also be had by a suit ... .

To reiterate, as I was confronted by several factors in the like of complicated and complex facts, the probable existence of fraud and unexplained intricate legal questions, I therefore had no hesitation in dismissing this application with costs. By the very nature of the multifaceted problems faced by the parties, I was inclined to believe that the plaintiff should file a

writ to resolve his grievance and treat it akin to a normal judgment debt action. In no uncertain terms, the matter at hand could not satisfactorily be explained by the available affidavits (*Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217).

Application dismissed with costs.

Reported by Loo Lai Mee